

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING
EN BANC**

77-1290

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

-v-

ANTHONY RICCO,

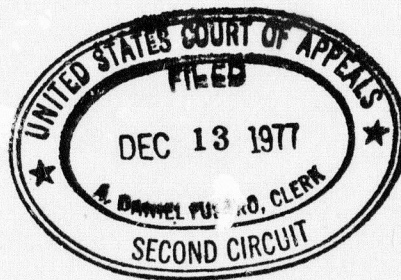
Appellant

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PETITION FOR REHEARING

SUGGESTION FOR REHEARING IN BANC



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-v-

ANTHONY RICCO,

Appellant

PETITION FOR REHEARING

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Appellant Anthony Ricco respectfully petitions this Court for a rehearing of the appeal in the above-entitled matter and suggests, pursuant to F.R.A.P. 35, that it would be appropriate for a rehearing in banc as the proceeding involves a question of exceptional importance which was misapprehended by the opinion of the Court.

STATEMENT OF CASE

In United States v. Ricco, -F.2d-, slip op. 567 (2d Cir., November 30, 1977), this Court affirmed a judgement of conviction (Lasker, J.) for violation of the federal narcotics laws, holding that, despite pretrial exclusion of the wiretap evidence due to failure to properly seal, a government witness was permitted to refresh his recollection of certain recorded conversations in preparation for his trial testimony. This Court's opinion stated that this use did not constitute "disclosure of the tapes or transcripts 'or any evidence derived therefrom'." Further, the Court held that such a use, prior to the commencement of trial proceedings, was a permissible one under 18 U.S.C. § 2517(2).

POINT

USE OF UNSEALED WIRETAP EVIDENCE
TO REFRESH RECOLLECTION IS A USE
WITHIN THE MEANING OF 18 U.S.C.
§§2517(3) AND 2518(8)(a)

This Court's opinion recognized that allowing the government witness, Peter Mengrone, to refresh his recollection with transcripts made from suppressed tapes was a "use" within the terms of 18 U.S.C. §§2517 and 2518 and further, was a nontestimonial use within the purview of §2517(2).¹ Appellant fully agrees that there was a "use". However, appellant respectfully suggests that the further finding of the Court, that because this use occurred prior to the commencement of trial, it is not a use within §2517(3), misapprehends the meaning and purpose of the statutory scheme.

The bases for this Court's holding are the language of §2517(3)³ and the comments and citations made in the Senate Report accompanying the statute. The language of the statute superficially supports the Court's position but closer analysis shows that the statute should not be so artificially and mechanically

1. §2517(3), in pertinent part, provides:

...may disclose the contents of that communication
or such derivative evidence while giving testimony under
oath or affirmation in any proceeding...

This language is the basis for the Court's distinction of testimonial versus nontestimonial.

2. §2517(2) only envisions "use" by a law enforcement officer, as opposed to disclosure permitted by either §2517 (1) or (3). Neither the Court nor the government addressed this difference in language. §2517(1) permits disclosure only to another law enforcement officer and is not applicable here.

3. No issue was made on appeal as to whether state or federal law applied. Appellant briefed the matter under both statutes and the government responded solely in terms of state law. Appellant notes that while the state statute is more stringent, the same conclusion suggested by his briefs and this petition result under both statutes.

construed, for the result of such an interpretation would be in conflict with the purpose of the sealing requirement and further would lead to anomalies. The Senate report is completely misinterpreted by the Court for it lends no support to the Court's holding. In fact, the report indicates the correctness of a conclusion directly opposite to this Court's decision.

A. The dividing line between the uses permitted under §2517(2) and those permitted under §2517(3) should be drawn by function and not by time.

The language of §2517(3),⁴ in its strictest terms, appears to limit the effect of a failure to seal tapes to a testimonial or "at trial" use. Seizing upon this language the Court has drawn an artificial line between all pre-trial uses and trial uses. Basing this distinction on whether or not the trial has actually begun is too artificial to be the appropriate dividing point. The issue is not the timing of the refreshing, but the purpose or function it is to serve. Any information gained by the use to refresh recollection will be used or disclosed at trial, no matter when it is shown to the witness. The ultimate harm remains the same - judicially unreliable tapes are used to effect the evidence presented at trial.

It has not been disputed by the Court or government that some enhancement or addition to the witness' recollection resulted from this use. The only purpose and effect of refreshing recollection is to enable a witness, unable to remember at the time of refreshing, to use the material to aid or stimulate his recollection. While the witness then testifies based on his own recollection, it cannot be denied that without the refreshing of his recollection, his testimony would either not be the same or unavailable at trial.

The true function of refreshing recollection is not to assist the prosecutor in the preparation of his case, but rather to enable the witness to have a present recollection of the facts in question so he may then testify.

4. See footnote No. 1, infra.

The key according to the Court's opinion, is whether this use is part of the investigative phase of a case or the trial phase. The error in this analysis is that the Court is too restrictive in defining the "trial" phase. The rationale behind §2517(1) and (2), as reflected by this Court's opinion in United States v. Fury, 554 F.2d 522 (2d Cir. 1977), is to allow use and disclosure of unsealed tapes for further investigation in a case without rendering the fruits of the further investigation inadmissible. But, once the investigation ceases, this rationale drops from sight. Trial preparation may occur a day, a month, or several months before trial, but the purpose remains the same. No investigative or other law enforcement purposes are being pursued, only the need to prepare witnesses for the time they are to give direct testimony from the witness stand. Thus, appellant contends the Court's opinion has incorrectly labeled this use as "nontestimonial", elevating form over substance. Clearly, the functional interpretation should be that the information and facts gained from refreshing his recollection were incorporated into the witness' direct testimony and, thus, were a use or disclosure of the unsealed tapes or evidence derived therefrom in violation of §2518(8) (a).

In light of the fact that the sealing requirements goes to the integrity and reliability of evidence, it is hard to believe that Congress intended to permit the use of unreliable evidence to refresh recollection one minute before trial while banning such a use one minute after commencement of trial.⁵ The result of such an interpretation would frequently appear foolish. Further, the Court's opinion would lead to several anomalous results. While unsealed tapes could not be used during a grand jury proceeding, as soon as a witness left the grand jury room he could use the same tapes for the purpose of trial preparation. And while the tapes could not be used during evidentiary hearings on pre-trial motions, the witness could leave the stand and use the tapes to refresh his recollection prior to the commencement of the trial.

5. This is virtually the situation presented by this case.

It is respectfully urged that for investigative purposes the unsealed tapes may be used, for any other rule would severely impede investigations, but for trial purposes, including preparation for trial, the considerations are very different and such use should not be countenanced. In other words, the division between permitted and prohibited use should not be drawn according to the time of use but according to the function of the use.

B. The Senate Report, as it analyzes §2517(3), does not support the Court's decision.

An essential ingredient in the reasoning of this Court's decision is its interpretation of the meaning of the Senate Report analyzing §2517(3) as it applies to this case. The Court's opinion states that the reference to Monroe v. United States, 234 F.2d 49 (D.C. 1956), cert. denied, 355 U.S. 875 (1957), in the Senate Report No. 1097, 90th Cong. 2d Sess. (1968), quoted in 2 (1968) U.S. Code Cong. Ad. News at 2188-89, was an approving reference to a use to refresh the recollection of a witness. Appellant's position is that this is a misapprehension of the nature and purpose of the Senate Report for several reasons, which shall be discussed below. This misapprehension necessitates a rehearing since the interpretation of Congressional intent played a crucial role in the panel's decision. The opinion states that the Report gives rise to "conflicting inferences" (slip op. 573). The Court chose the one it did based on its belief that Congress did not intend to disapprove of, or overrule, Monroe. Appellant contends that further analysis of the Senate Report and the cases cited therein leads to the opposite inference and result.

First, examination of the cases cited in the Senate Report reveals that reference to these cases could not have been for approval of the cases themselves, but merely as examples of the uses permitted by §2517(3) once the requirements of that section and the sealing provision in §2518(8)(a) are met.

People v. Saperstein, 2 N.Y. 2d 210 (1957), held that evidence procured under the New York wiretapping statute was admissible at trial, but this statute was the same one subsequently found unconstitutional in Berger v. New York, 388 U.S. 41 (1967). And, of course, Berger was one of the prime reasons for the development of the legislation the Senate Report was analyzing. It strains reason to believe that the Senate Report approved a decision whose rationale was overruled by the Supreme Court in Berger, when Title III was developed in response to the Supreme Court's rulings in Berger and Katz v. United States,
6
389 U.S. 347 (1967).

People v. Hughes, 203 Cal. App. 2d 598, 21 Cal. Rptr. 668 (1962), permitted impeachment by conversations recorded by a device secreted in a room where all parties to the conversation, other than the accused, were aware of and consented to the recording. The court held that this rule was not so offensive as to render the tape unreliable: "The deception itself does not render the statement inadmissible for it is not of a type reasonably likely to procure an untrue statement." 21 Cal. Rptr. at 670. This analysis would not be necessary under then, as now, existing federal case law analysis of intercepted communications, which holds that such a recording is consensual and admissible for all purposes. On Lee v. United States, 343 U.S. 747 (1952).

Further, reference to Monroe itself under §2517(3) undercuts the notion of an approving reference. The Report lists acceptable uses of evidence "at trial". Monroe does not hold that such evidence can be used at trial, rather it holds that use of a tape of a conversation recorded by the witness (who was a participant in the conversation) to refresh his recollection prior to testifying was not a violation of § 605 of the Communications Act.

6. See, Senate Report No. 1097, 2 (1968) U.S. Code Cong. & Ad. News at p. 2153.

The statutory scheme in existence when Monroe was decided differs from Title III in several areas, but for the purposes of this petition it is crucial to note that neither the Communications Act nor case law at that time required judicial sealing. §605 operated as an exclusionary device and exclusion under Fourth Amendment principles is designed to deter unlawful police conduct in obtaining evidence; It is the manner of interception that is at issue, not the reliability of the evidence obtained. Thus, for example, should a search violate the Fourth Amendment, evidence thus obtained may still be used before a grand jury since the deterrence effect of exclusion would be minimal. United States v. Calandra, 414 U.S. 338 (1974).

Sealing though, is designed to insure the reliability of evidence. §2518(8) (a) establishes mandatory, minimum custodial requirements for the safeguarding of recordings of intercepted communications. Evidence which does not meet this minimum cannot be used because it is legally unreliable. United States v. Gigante, 538 F.2d 502 (2d Cir. 1976). Here, the evidence may have been obtained in the statutory manner, but cannot be used based on its legal unreliability due to improper or inadequate custodial arrangements which violate the core of Title III, preserving the privacy rights of individuals.

Finally, the Court's opinion in this case can also be read as a disapproval of the rationale of Monroe (the witness only repeated what he himself heard at the time of the conversation). The Court's opinion holds that such refreshing of recollection is a "use" under §2517, albeit a nontestimonial one. The opinion goes on, at slip op. p. 571, to hold that if such a use occurred during trial the prohibition of §2518(8) (a) would apply. This leads to the inference that "use or disclosure" does occur when a witness' recollection is refreshed, which is contrary to the rationale of Monroe.

Appellant respectfully requests a rehearing in banc, as further analysis shows that the inference to be drawn from the Senate Report is that use of tapes

to refresh recollection is permissible only if the sealing provision of §2518 (8) (a) is satisfied, otherwise the inclusion of Monroe under §2517(3) has no meaning. If Monroe-type use falls within §2517(2), as the Court's opinion holds, then mention of it as acceptable under §2517(3) makes little sense. The framers of the Report could only have regarded any use of wiretap evidence to refresh recollection as being permitted under §2517(3), and therefore requiring compliance with §2518(8) (a).⁷

CONCLUSION

THE PETITION FOR REHEARING IN BANC SHOULD
BE GRANTED, AND UPON REHEARING IN BANC,
THE JUDGEMENT REVERSED AND THE CASE REMANDED
FOR A NEW TRIAL OR, IN THE ALTERNATIVE, A
HEARING ON THE EXTENT OF THE IMPROPER USE OR
DISCLOSURE.

Respectfully submitted,

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Attorney for Appellant

December, 1977

7. While appellant believes the above position is correct and requires reversal of the judgement below, the relief requested could be limited to those cases, such as Ricco's, where a judicial finding of unreliability due to improper sealing was made prior to the use of the evidence. Any use or disclosure as part of trial preparation should be prohibited subsequent to such a judicial ruling.

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